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No. 98-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

WILLIAM MALLORY, HAZEL L. BLAND, CHARLES W. CROSS, ROBERT DOGAN, DONALD H. ELLIS, JESSIE GOODING, JEFFREY D. JOHNSON, CASEY C. JONES, C.J. PRENTISS, DEBORAH STOKES-ABRAHAM, VERNON SYKES, and GLADYS M. WALCOTT,

Petitioners,

v.

STATE OF OHIO, ROBERT TAFT, and KENNETH BLACKWELL,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the three preconditions set forth in *Thornburg v. Gingles*, 478 U.S. 30 (1986), for establishing a claim of vote dilution involving multi-member districts for legislative elections under Section 2 of the Voting Rights Act are necessarily dispositive of all claims of vote dilution, and in particular those involving multi-member districts for judicial elections?

2. Whether it is proper, in evaluating a claim of vote dilution under Section 2 of the Voting Rights Act, to ignore the extent to which past racial discrimination, including official racial discrimination, in the political process and in such areas as housing, education, employment, and health has hindered participation by members of minority groups as candidates in the political process?

PARTIES TO THE PROCEEDING

The petitioners in this case are all Ohio citizens. Petitioners are plaintiffs in this case and were the appellants in the court below. The petitioners are all individuals, and thus there are no disclosures to be made pursuant to Supreme Court Rule 29.6.

The State of Ohio, its Governor, and its Secretary of State are the defendants in this case, and the current officeholders have been substituted for their predecessors, who were the appellees in the court below.

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INTRODUCTION

Petitioners respectfully petition for a writ of *certiorari* to review the judgment entered by the United States Court of Appeals for the Sixth Circuit in this proceeding.

The ruling below mechanically applied the three preconditions that the Court set forth in *Thornburg v. Gingles*, 478 U.S. 30 (1986), for establishing a claim of vote dilution

involving multi-member districts for legislative elections, and held that they are necessarily dispositive of all claims of vote dilution involving multi-member districts for judicial elections. This approach fails to recognize the rather distinct nature of the inquiry that must be made in these circumstances under Section 2 of the Voting Rights Act. In judicial elections involving multi-member districts, where the judges elected will exercise a jurisdiction and serve a venue broader than a single-member district, there is greater reason to consider other factors, such as those relevant to claims of influence-dilution. The Court has reserved this important issue in prior cases, and should take the opportunity to decide it here.

In addition, the lower courts improperly ignored the extent to which past racial discrimination, including official racial discrimination, in the political process and in such areas as housing, education, employment, and health has hindered participation by members of minority groups as candidates in the political process. In its findings of fact, the trial court squarely recognized the pervasive nature of such past discrimination, the effects of which have manifested themselves in the relative paucity of African-American judicial candidates. Rather than take this fact into account, however, the court below simply stated that it could not even consider this fact in evaluating the three *Gingles* preconditions — even those which relate to racial polarization in voting. This holding, which conflicts with the plain language of the Voting Rights Act and with decisions rendered by two other Circuits, warrants plenary review in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit is reported as *Mallory v. Ohio*, 173 F.3d 377 (6th Cir. 1999), and is reprinted in the Appendix to this petition ("Pet. App.") at 1a-13a. The Sixth Circuit's opinion affirmed an order and opinion of the United States District Court for the Southern District of Ohio, which had granted judgment to defendants. The District Court's opinion is reported as *Mallory v. Ohio*, 38 F. Supp. 2d 525 (S.D. Ohio 1997), and is reprinted at Pet. App. 14a-119a.

STATEMENT OF JURISDICTION

The Court of Appeals for the Sixth Circuit issued its decision on April 13, 1999. Pet. App. 1a. Justice Stevens granted an extension of time for filing this petition to and including August 11, 1999. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

PROVISIONS INVOLVED

Section 2 of the Voting Rights Act provides as follows:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b (f)(2) of this title, as provided in subsection (b) of this section.
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973 (emphasis in original).

STATEMENT OF THE CASE

This action was filed by the twelve named plaintiffs, each of whom is an African-American citizen residing in the State of Ohio. Five are current or former state legislators. The central claim in the case is that the use of district-wide at-large elections to elect judges to various state courts results in the denial or abridgment of their right to vote under Section 2 of the Voting Rights Act, 42 U.S.C. § 1973. The District Court certified this case as a class action on behalf of the voting-age population of African-American citizens throughout Ohio who are entitled to vote and to elect judges in each of the challenged courts. *See* Pet. App. 16a-17a.

A. The Historical Background.

The structure and organization of Ohio's state court system are established by the Ohio Constitution and by statute. The District Court noted that the basic structure in which territorial jurisdiction is based solely on geography dates to the 1850's, "when race was not an issue in the structure of state government in Ohio." Pet. App. 22a. To the extent that race was not an issue then, of course, the explanation lies in official racial discrimination by the government, which did not accord African-Americans the same political and legal rights enjoyed by other citizens. Moreover, there was no dispute among the parties that Ohio's African-American citizens have suffered pervasive discrimination — both official and unofficial — in the areas of housing, education, employment, and health, which have superimposed enduring patterns of segregation upon the existing territorial and political divisions. *See id.* at 39a.

In addition, there is no serious dispute among the parties in this case that "disparities remain among whites and African-Americans in several socio-economic categories as a result of such discrimination," which again includes both official and unofficial racial discrimination that African-Americans have consistently experienced over the years. *Id.* The District Court took judicial notice of "numerous reported judicial decisions containing official findings of discrimination against African-Americans in each of Ohio's eight most populous counties." *Id.*

The District Court noted that the evidence submitted did not appear to establish that the effects of past discrimination tend to hamper the ability of African-Americans to participate as voters in the political process. Nonetheless, one result of this prolonged racial discrimination in areas such as education and employment, which emerges from the most recent statistics cited by the District Court, is that although African-Americans now constitute 10.65% of Ohio's populatic n, only 3.5% of Ohio's registered attorneys are "attorneys of color" — a category that includes but is not limited to African-Americans. *See id.* at 16a, 29a. The latter fact takes on particular significance in judicial elections, in which the eligible candidates are limited under state law to registered attorneys who have been "engaged in the practice of law for a minimum of six years." *Id.* at 23a; *see also* Ohio Rev. Code §§ 1901.06, 2301.01, 2501.02.

This effect is further exacerbated by other established features of judicial elections in Ohio, which tend to favor candidates who have previous experience in judicial office and those who already serve as incumbents. *See* Pet. App. 26a-28a. Another important factor is ready access to resources and financing, *see id.*, though the District Court had also made a factual finding that "disparities remain among whites and African-Americans in several socio-economic categories" because of pervasive past discrimination in areas like housing, education, employment, and health, *id.* at 39a. In addition to these determinants, it is clear that the race of judicial candidates and voters also plays a role in determining the outcome of judicial elections in Ohio. *Id.* at 29a. The ultimate convergence of these various factors has resulted in a situation in which current reports indicate that only 4.6% of the elected state court judges in Ohio are African-American. *Id.* at 40a.

B. The Rulings Below.

The District Court rejected petitioners' legal challenges to Ohio's widespread use of multi-member, at-large districts in judicial elections. Prior to trial, it had disposed of the claim that this practice constituted intentional discrimination in violation of the Fourteenth and Fifteenth Amendments, *see* Pet. App. 17a,

and petitioners did not appeal on that issue. At trial, the court considered petitioners' more narrow claim that the use of this practice in elections to many of the larger courts around Ohio violated Section 2 of the Voting Rights Act.

The District Court concentrated almost entirely on the three preconditions that the Court laid down to govern challenges brought under Section 2 to multi-member legislative districts in *Thornburg v. Gingles*, 478 U.S. 30 (1986):

> First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district. . . . Second, the minority group must be able to show that it is politically cohesive. . . . Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate.

Id. at 50-51. *See also Voinovich v. Quilter*, 507 U.S. 146, 157 (1993) (applying *Gingles* preconditions to challenge brought under Section 2 to state legislative districts).

According to the District Court, relying on established Sixth Circuit precedent, no violation of Section 2 can be proven in judicial elections "'where the three *Gingles* preconditions have not been established.'" Pet. App. 86a-87a (quoting *Cousin v. McWherter*, 46 F.3d 568, 577 (6th Cir. 1995)). Indeed, with respect to judicial elections, the court determined that satisfaction of the three *Gingles* preconditions "is necessary, but not sufficient" to establish liability under Section 2. Pet. App. 93 a (quotation and citations omitted).

On the first *Gingles* precondition, the District Court held that "the African-American voting age population in a judicial district must be so numerous as to constitute more than 50% of the population of at least one single-member district," and also stated that the "concept of one-man, one-vote apportionment does not apply to the judicial branch of government." Pet. App. 86a (citations omitted). Applying this standard, the court ultimately concluded that petitioners had satisfied their burden

of proving that African-Americans "can constitute a majority in a hypothetical, geographically compact, single-member subdistrict" only with respect to four courts: the First District Court of Appeals (Hamilton County), *id.* at 109a; the Hamilton County Court of Common Pleas, *id.* at 110a; the Franklin County Court of Common Pleas, *id.* at 107a; and the Cuyahoga County Court of Common Pleas, *id.* at 104a. The court found that petitioners had failed to carry their burden of proof with respect to the other challenged judicial districts — including the Franklin County Municipal Court and the Tenth District Court of Appeals, both of which encompass exactly the same territorial jurisdiction as the Franklin County Court of Common Pleas, as well as the Eighth District Court of Appeals, which encompasses exactly the same territorial jurisdiction as the Cuyahoga County Court of Common Pleas. *See id.* at 18a-19a; *see also id.* at 43a-44a, 52a.

On the second and third *Gingles* preconditions, the District Court recognized that both factors would require it "to examine the extent to which voting in Ohio's judicial elections is 'racially polarized'" by considering the incidence of bloc voting by both African-Americans and Caucasians. *Id.* at 88a-91a. Petitioners presented extensive testimony to establish the existence of racially polarized voting, all of which the District Court dismissed because it was not compiled as statistical data. *See id.* at 30a-31a. Petitioners also presented a number of witnesses at the trial who testified that potential African-American judicial candidates often are "'chilled' or discouraged from seeking office due to the perception that black candidates cannot overcome white bloc voting and be elected." *Id.* at 35a. The District Court ignored this issue, and the testimony submitted, because it stated that it could not submit "candidates who do not run" to any form of direct statistical measurement. *Id.* at 36a. Instead, it endorsed a study submitted by respondents, which was limited only to those election contests in which one or more African-American candidates ran for judicial office, regardless of the circumstances of those contests, *id.*; it also relied on studies that sought to measure voter behavior by aggregating numerous judicial campaigns in which no African-

American candidate was on the ballot, but in which respondents' statistical analysis attempted to identify a preferred "candidate of choice" for African-American voters, *id.* at 29a-34a.

This methodology, of course, completely foreclosed any consideration in this case of the "chilling effect" that petitioners identified as part of their explanation for the very small numbers of African-American judicial candidates and elected judges, which they alleged was caused in part by the use of at-large districts in judicial elections. *See id.* at 36a-37a. The court also did not afford any separate consideration to the facts it had recognized about the history of both official and unofficial racial discrimination in Ohio in such areas as housing, education, employment, and health, and their continuing consequences for the participation of African-Americans as potential candidates for judicial office.

In addition, the District Court held that "Ohio's interest in maintaining the link between its trial and appellate court territorial jurisdictions and those courts' electoral districts is substantial," and therefore a challenge to multi-member judicial districts would require petitioners to present even *more* "substantial proof of racial dilution" than is required in a legal challenge to multi-member legislative districts. Pet. App. 98a (citations omitted). The court further held that even if it found a violation of Section 2, it lacked authority to fashion a remedy that would order "the creation of a judicial system under which the challenged courts would be divided into electoral subdistricts with a single judge being elected from each subdistrict," as sought by petitioners, because such a remedy would "impermissibly alter the structure of Ohio's judicial system." *Id.* at 102a, 103a. Elsewhere, however, the court had recognized that a different judge on the same court had earlier approved the subdistricting of the Hamilton County Municipal Court into seven subdistricts, two of which contain a majority of African-American population, after it was determined that the composition of that court violated Section 2. *See id.* at 37a, 58a (citing *Mallory v. Eyrich*, 717 F. Supp. 540 (S.D. Ohio 1989), *appeal dismissed*, 898 F.2d 154 (6th Cir. 1990)).

Based on the foregoing discussion, the District Court ruled that petitioners had failed to establish a violation of Section 2 for any of the challenged courts. It therefore entered a final judgment in favor of respondents, dismissing all of petitioners' remaining claims. *Id.* at 119a.

Petitioners appealed on the Voting Rights Act claims. The Sixth Circuit affirmed, essentially adopting each of the points discussed by the District Court. In particular, it agreed that "the three '*Gingles* preconditions' . . . [are] necessary, but not sufficient, conditions for a plaintiff to succeed in a Voting Rights Act claim" for multi-member judicial districts. Pet. App. 3a. It upheld the District Court's finding that the first *Gingles* factor was met only with respect to four of the eighteen challenged judicial districts, without commenting on the complete overlap between some of the districts contained in each category. *Id.* at 7a-8a. It also upheld the District Court's findings on the second and third *Gingles* factors, endorsing its decision to credit respondents' statistical analysis over the contrary testimony presented by petitioners. *Id.* at 8a-9a.

The Court of Appeals did not discuss petitioners' evidence, which the District Court had credited, on the history of racial discrimination in Ohio in the areas of housing, education, employment, and health and how the effects of that discrimination and continuing disparities may bear upon the participation of African-Americans as candidates for judicial office. It did consider petitioners' contention that the District Court had erred because it "disregarded testimony that Ohio's electoral system discourages minorities from running for office." *Id.* at 10a. Yet the Court of Appeals rejected the possibility that this alleged "chilling effect" could support a violation asserted under Section 2, because respondents had presented evidence that certain African-American judicial candidates have recently succeeded in being elected to the bench. *Id.* at 11a.

On this issue, the court below noted that two other circuits have endorsed "the proposition that district courts should consider the possibility that African-Americans do not run because they cannot win. *See Nipper v. Smith*, 1 F.3d 1171,

1179-80 (11th Cir. 1993); *Westwego Citizens for Better Gov't v. Westwego*, 872 F.2d 1201, 1208-09 n.9 (5th Cir. 1989); *McMillan v. Escambia County*, 748 F.2d 1037, 1045 (5th Cir. 1984)." Pet. App. 11a. The Sixth Circuit, however, declined to adopt this approach, and held that in any event it could have no relevance to a situation in which some evidence is presented that African-American candidates can actually prevail in certain elections. *Id.* This petition for certiorari followed.

REASONS FOR GRANTING THE WRIT

This petition raises unresolved issues concerning the proper application of Section 2 of the Voting Rights Act to elections in multi-member judicial districts. Almost a decade ago, in *Chishom v. Roemer*, 501 U.S. 380 (1991), and *Houston Lawyers' Ass'n v. Attorney General*, 501 U.S. 419 (1991), the Court held that Section 2 does apply to judicial elections, but expressly reserved the issue of what criteria should be applied to evaluate such claims. *See id.* at 426-27; *Chishom*, 501 U.S. at 402-03. The court below held that in making out a valid Section 2 challenge of vote dilution in the context of a multi-member judicial district, it is necessary but not sufficient to satisfy the three preconditions that the Court marked out to govern claims of vote dilution involving multi-member districts for legislative elections. *See Thornburg v. Gingles*, 478 U.S. 30 (1986). This approach is flawed because it fails to consider the possibility that because such elected judges will exercise a jurisdiction and serve a venue broader than a single-member district, there is greater reason to consider other factors, such as those relevant to claims of influence-dilution. The Court has repeatedly reserved questions about the proper legal standards governing such claims, which are appropriate for resolution in this case.

In addition, the court below treated as irrelevant the unrebutted evidence that the District Court had credited concerning the extent to which past racial discrimination, including official discrimination, in the political process and in such areas as housing, education, employment, and health has hindered participation by members of minority groups as

candidates in the political process. The effects of this pervasive discrimination, which continue to be reflected in socio-economic disparities, are manifested in the relative paucity of African-American judicial candidates. Yet the court below improperly ignored this fact and limited its evaluation solely to the three *Gingles* preconditions. Because this approach conflicts with the text of the Voting Rights Act and with decisions rendered by two other Circuits, it also warrants the Court's review here.

I. THE COURT SHOULD DECIDE THE IMPORTANT QUESTION, WHICH IT HAS RESERVED, OF WHETHER THE *GINGLES* PRECONDITIONS ARE NECESSARILY DISPOSITIVE OF ALL CLAIMS OF VOTE DILUTION, AND IN PARTICULAR THOSE INVOLVING MULTI-MEMBER DISTRICTS IN JUDICIAL ELECTIONS.

In *Thornburg v. Gingles*, 478 U.S. 30 (1986), the Court first confronted the issue of how to analyze a claim brought under Section 2 to challenge the legality of multi-member legislative districts on the ground that they operated to dilute the votes of minority citizens. In the course of sanctioning the legal claim framed in that case, the Court identified three central preconditions that govern such challenges: (1) the minority group challenging the practice must show that it can constitute a majority in a single-member district; (2) it must show that it is politically cohesive; and (3) it must show that racial bloc voting usually defeats the minority's preferred candidate. *Id.* at 50-51.

The *Gingles* preconditions were adopted by the Court as a judicial gloss on the actual text of Section 2, which states that any standard, practice, or procedure which denies or abridges the right to vote by causing members of minority groups to "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice" is unlawful. 42 U.S.C. § 1973(b). It is well known that Congress enacted this language in 1982 to overturn the Court's strict holding that the dilution of minority votes is only actionable under the Constitution where the complaining

party can show that the challenged electoral rules were designed with a racially discriminatory purpose. *See Mobile v. Bolden*, 446 U.S. 55 (1980). The report of the Senate Judiciary Committee, which accompanied the proposed legislation, identified seven factors, plus a residual factor, that would serve as useful guides for the courts as they went about applying the new "results standard" in future cases. *See Voting Rights Act Extension*, S. Rep. No. 97-417, 97th Cong., 2d Sess. 28-29 (1982).

As a general matter, however, the Court's decision in *Gingles* has been construed as having commanded that the three preconditions must be regarded as essential (though not sufficient) conditions governing *all* Section 2 claims of vote dilution, not simply those claims generated by multi-member legislative districts. That is how the court below applied *Gingles* in this case, *see* Pet. App. 3a, and some other courts have followed suit. *See, e.g., Bradley v. Work*, 154 F.3d 704, 710 (7th Cir. 1998) (the three *Gingles* criteria must be shown to establish a claim of vote dilution under Section 2 in any challenge to multi-member judicial districts).

In fact, this rigid approach rests on a misreading of *Gingles*, where the Court clearly intimated that the three preconditions were *not* intended to apply to claims that a particular electoral standard, practice, or procedure impaired the ability of members of a minority group to *influence* elections. As the Court stated:

> We have no occasion to consider whether § 2 permits, and if it does, what standards should pertain to, a claim brought by a minority group, that is not sufficiently large and compact to constitute a majority in a single-member district, alleging that the use of a multimember district impairs its ability to *influence* elections.

478 U.S. at 46 n.12. *See also id.* at 87-88 (O'Connor, J., concurring) (under Section 2, a minority group's voting strength should be referenced not only with respect to its prospects for electoral success but also in terms of "other avenues of political influence").

The Court has since reiterated that these issues remain undecided. *See Johnson v. De Grandy*, 512 U.S. 997, 1008-09 (1994); *Voinovich*, 507 U.S. at 156-60; *Growe v. Emison*, 507 U.S. 25, 41 n.5 (1993). It also has noted that the eventual recognition of influence-dilution claims will require the *Gingles* preconditions to be reconfigured, and the first precondition, in particular, may have to be "modified or eliminated." *Voinovich*, 507 U.S. at 158. For these reasons, therefore, "the *Gingles* factors cannot be applied mechanically and without regard to the nature of the claim." *Id.*

Moreover, it is far from clear whether the three *Gingles* preconditions should be virtually the sole basis for evaluating a claim of vote dilution directed to multi-member judicial districts. In the two decisions where the Court has held that Section 2 is applicable to judicial elections, it has reserved the issue of what criteria should be applied to evaluate the validity of such claims. *See Houston Lawyers' Ass'n*, 501 U.S. at 426-27; *Chishom*, 501 U.S. at 402-03. As the Court recognized, elected judges are candidates for office, but they are not simply "representatives" in every classic sense of the term, and their functions obviously differ from those fulfilled by legislators. *See id.* at 400-01; *see also id.* at 410-11 (Scalia, J., dissenting). Elected judges typically exercise a jurisdiction and serve a venue broader than a single-member district, and the one-person, one-vote principle has not been applied to judicial districts. *See Wells v. Edwards*, 347 F. Supp. 453 (M.D. La. 1972), *summarily aff'd*, 409 U.S. 1095 (1973). For these reasons, there is more justification for taking into account other factors in evaluating Section 2 claims concerning judicial elections, such as those factors which are relevant to claims of influence-dilution.

Nonetheless, the court below held that in making out a valid Section 2 challenge of vote dilution in the context of a multi-member judicial district, it is necessary but not sufficient to satisfy the three preconditions that *Gingles* laid down to govern challenges to multi-member districts for legislative elections. *See* Pet. App. 6a. This approach created a host of problems in this case that otherwise could have been avoided.

First, the lower courts determined that in only 4 of the 18 judicial districts challenged by petitioners was it possible to create a majority-minority subdistrict. Pet. App. 7a. Some of these factual findings appear to be clearly erroneous on their face, as the District Court found it possible to draw such subdistricts in certain courts whose territorial jurisdiction overlapped precisely with the jurisdiction of other courts for which the court found it not possible to do so. For example, the District Court held that petitioners had met their burden of proving that African-Americans "can constitute a majority in a hypothetical, geographically compact, single-member subdistrict" with respect to the Franklin County Court of Common Pleas, *id.* at 107a, but not with respect to the Franklin County Municipal Court, *id.* at 108a, even though they have the same territorial jurisdiction and virtually the same number of judges (16 and 14, respectively, *see id.* at 21a). The court also went on to hold that no such majority district could be created for the Tenth District Court of Appeals, which has eight judges and also encompasses only Franklin County, *id.* at 106a, even though the court could have taken judicial notice of the corresponding legislative boundaries, which reveal that of the nine state house districts that include all or part of Franklin County, two have been consistently represented by African-American legislators for many years.

More broadly, however, the District Court was able to reject petitioners' challenges to 14 of the 18 at-large judicial districts because it limited itself to considering only whether a majority-minority subdistrict could be created in each. Without also addressing the possibility that petitioners' Section 2 claim could be evaluated in terms of influence dilution, which would seem to be a much more appropriate consideration in assessing judicial districts and nonpartisan judicial elections, the District Court put itself into an analytical straightjacket that needlessly bound it to conclude that much of petitioners' Section 2 claim would fail on this ground.

With respect to the second and third *Gingles* preconditions, again the approach taken below was too narrow. The court held that petitioners also must satisfy both of these preconditions in

order to frame a valid challenge under Section 2. Because it concluded, based strictly on the statistical data submitted by respondents, that racial voting was not significantly polarized in any of the judicial districts, the court held that it could dispense entirely with any consideration of past racial discrimination throughout Ohio or any of the other factors set out in the Senate report. The court did so even though it found that such discrimination had been pervasive and had created continuing socio-economic disparities, which no doubt have hindered African-Americans from participating in the political process as candidates for judicial office. *See* Pet. App. 39a.

This severe limitation of the court's inquiry is unjustified as a matter of law and policy. *See, e.g., Gingles*, 478 U.S. at 99 (O'Connor, J., concurring) ("a court should consider all relevant factors bearing on whether the minority group has less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice" and "should not focus solely on the minority group's ability to elect representatives of its choice"); *Buckanaga v. Sisseton Indep. Sch. Dist.*, 804 F.2d 469 (8th Cir. 1986) (taking into account all of the factors identified in the Senate report). As discussed more fully in Section II, *infra*, the conceded effects of pervasive racial discrimination in areas such as education and employment are especially telling in view of various features of Ohio judicial campaigns, including the substantial qualifications that must be satisfied before a person becomes eligible to declare himself or herself a candidate for the bench.

For these reasons, the Court should grant review to consider the proper contours of the judicial inquiry into proving a violation of Section 2 in challenges to at-large judicial districts.

II. THE COURT BELOW ERRED BY REFUSING TO CONSIDER PAST RACIAL DISCRIMINATION IN JUDGING THE CONSEQUENCES OF ELECTORAL PRACTICES THAT HAVE HINDERED MINORITY CANDIDATES FROM PARTICIPATING IN THE POLITICAL PROCESS.

Petitioners also contended in the court below that the consequences of pervasive past discrimination against African-Americans in such areas of housing, education, employment, and health, coupled with the use of at-large judicial districts, has tended to result in their having "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice" in certain judicial elections in Ohio. 42 U.S.C. § 1973(b). The District Court found that the vast extent of such past discrimination, which was unrebutted in this case, continues to be felt today in identifiable disparities between whites and African-Americans in "several socio-economic categories." Pet. App. 39a.

These effects are heightened in judicial elections, which are marked by certain unique aspects. First, the qualifications required to hold office on the bench are set at a higher threshold — Ohio requires judicial candidates to be registered attorneys who have been "engaged in the practice of law for a minimum of six years." Pet. App. 23a; *see* Ohio Rev. Code §§ 1901.06, 2301.01, 2501.02. These professional requirements definitely magnify the lingering effects of past racial discrimination in education and employment, as well as the continuing socio-economic disparities that the trial court acknowledged. Second, the limited nature of the pool of eligible minority candidates is further restricted by other established features of at-large judicial elections in Ohio, which tend to favor candidates with prior experience in judicial office, who already serve as incumbents, and who have ready access to resources and financing. *See* Pet. App. 26a-28a. 29a. These facts are not preclusive of African-Americans holding judicial office, but they do tend to explain why only 4.6% of the elected state court judges in Ohio are African-American. *Id.* at 40a.

In addition, petitioners have consistently alleged that the use of at-large judicial districts has created a "chilling effect" that discourages African-Americans from running for judicial office because of the widespread perception that they cannot win. This contention presents a valid claim under the Voting Rights Act. In *Gingles*, the Court observed that whenever "a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by [minority] and white voters to elect their preferred representative," a proper claim lies under Section 2. 478 U.S. at 47. The Court more than once has cautioned the lower courts that "'the *Gingles* factors cannot be applied mechanically and without regard to the nature of the claim.'" *De Grandy*, 512 U.S. at 1007 (quoting *Voinovich*, 507 U.S. at 158).

Yet the court below engaged in just such a "mechanical" application of *Gingles* here. It rested solely on the three preconditions, completely ignored petitioners' evidence of historical discrimination, and rejected their contention that the alleged "chilling effect" is relevant to a Section 2 claim. Pet. App. 10a-11a. In essence, it held that if African-Americans can be shown to have prevailed in a few such races in recent elections, then it does not matter whether they have been generally discouraged from running in the vast majority of past elections. *Id.* This approach cannot be squared with other statements made elsewhere in *Gingles*, which cautioned that where "a minority group has begun to sponsor candidates just recently, the fact that statistics from only one or a few elections are available for examination does not foreclose a vote dilution claim." 478 U.S. at 57 n.25.

Even more to the point, this approach conflicts with the plain language of the Voting Rights Act, which, as discussed above, forbids the use of any and all election practices or procedures that result in members of a minority group having "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice," whether or not the three *Gingles* preconditions have been satisfied. 42 U.S.C. § 1973(b). And it also conflicts

with decisions by two other circuits. The Firth Circuit has noted that "the lack of black candidates is a likely result of a racially discriminatory system." *McMillan v. Escambia County*, 748 F.2d 1037, 1045 (5th Cir. 1984). In a later decision, the same court elaborated further that sparse or speculative data counsels for greater flexibility in applying *Gingles* to vote-dilution claims. *Westwego Citizens for Better Gov't v. Westwego*, 872 F.2d 1201, 1208-09 (5th Cir. 1989). It thus criticized the trial court for having rejected "the argument that black candidates 'don't run because they can't win' as a basis for considering evidence" from other sources. *Id.* at n.9. "To hold otherwise would allow voting rights cases to be defeated at the outset by the very barriers to political participation that Congress has sought to remove." *Id.* The Eleventh Circuit has now echoed these statements in concluding that relief cannot be denied under Section 2 where the evidence indicates that minority candidates have been discouraged by the effects of past discrimination, coupled with some identifiable election practice or procedure, from running for the offices which are at issue in the case. *See Nipper v. Smith*, 1 F.3d 1171, 1179-80 (11th Cir. 1993). The causal nexus between persistent socio-economic disparities and a depressed level of political participation by members of a given minority group is one that can be assumed as a matter of law. *See, e.g., United States v. Marengo County Comm'n*, 731 F.2d 1546 (11th Cir.), *appeal dismissed and cert. denied*, 469 U.S. 976 (1984).

Thus the Court of Appeals incorrectly rejected petitioners' evidence of past discrimination and their contentions based on the "chilling effect" that at-large judicial districts have exerted to discourage participation by minority candidates. Its holding conflicts with the text of the Voting Rights Act and with decisions by other circuits. The Court should grant review in this case to clarify and resolve the proper approach to Section 2 claims in all cases involving at-large judicial districts.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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